No. 2603

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC POWER COMPANY
(a corporation),
Plaintiff in Error,

vs.

P. R. SHEAFF,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE STATE OF NEVADA.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

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Filed this.....day of October, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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The defendant in error, both in his brief and on oral argument, persistently charges the plaintiff in error with "criminal negligence" in building its lightning arrester too close to the ground and too near the substation building. No evidence was offered to show that the lightning arrester was built too near the substation. Consequently the so-called "criminal negligence" of plaintiff in error must have consisted in building its lightning arrester too close to the ground.

The only evidence introduced to show that the lightning arrester was built too close to the ground

consisted of the *opinions* of certain persons to that effect. Opposed to these opinions were others, given by *practical men,* to the effect that the lightning arrester was properly constructed and placed.

The undisputed *facts* demonstrate that there was no impropriety in the construction or placing of the lightning arrester.

The reason given for the conclusion that the lightning arrester was built too close to the ground was that in that position its dangerous character was increased. In other words, it is claimed that if the lightning arrester had been built at a greater distance from the ground it would be less likely to do injury.

In making this contention defendant in error fails to distinguish between danger to the *public* and danger to *employees.* It may be quite true that such a contrivance, if sufficiently elevated, would be less likely to injure persons or animals happening to be in its immediate vicinity than if placed near the ground. But no such question is involved in this case. The rule is well settled that even if a defendant owes a duty to some one else, but does not owe it to the person injured, no action will lie. The duty must be owed to the person injured.

Tennessee etc. Co. v. Smith, 55 So. 170;
Buckley v. Gray, 110 Cal. 359 (and cases cited).

Here the situation presented is danger to an employee, whose duty it was to work "near and around" dangerous contrivances and who, as an electrician's helper, is admitted by the pleadings to have had all the knowledge, experience and caution necessary to the proper performance of the duties of that occupation. We say this is admitted because the complaint sets forth that he was employed as an electrician's helper and there is no allegation of ignorance of his duties or want of knowledge of its dangers.

Professor Scrugham, the expert witness of defendant in error, testified, in substance, that it would be more dangerous for an employee to work around an elevated dangerous contrivance than one near the ground, because an employee can handle himself better on the ground than when suspended above it (Rec. p. 314, fol. 126). This testimony was not disputed by any other witness for defendant in error but, on the contrary, was supported by witnesses for plaintiff in error.

It clearly appeared that it was the duty of electricians and their helpers to work with and about live electric wires, and that it was frequently necessary to climb poles for that purpose and to handle "hot" wires while so suspended (Rec. p. 430, fols. 425-426). It is plain common sense that in doing such work an employee can avoid dangers much better while standing on the ground than when in an elevated position.

This is particularly true in working around high tension wires. In handling low voltage wires a pole is ordinarily sufficient insulation for an employee. If completely insulated he can handle such wires in safety. But with high tension wires there is great difficulty in insulation, because a pole may be damp or contain salt and thus become a sufficiently good conductor to render the position of an employee working thereon exceedingly hazardous.

Therefore, the opinions of experts to the effect that the lightning arrester was built too close to the ground must be held to apply only to the safety of the general public, because the undisputed testimony shows that so far as employees are concerned it is safer when constructed near the ground.

It is well settled that employers have the undisputed right to construct buildings, machinery and other contrivances used in carrying on their own business, in their own way, provided such construction is "safe" within the requirements of the master and servant rule (see *Reed v. Stockmeyer,* 74 Fed. 186-190). He may conduct his business in the way that seems to him best, although other ways may be less hazardous. In such case, if the servant knows the danger attendant upon such manner of prosecuting the work, and the hazard is not latent, he assumes the risk of the more hazardous method.

Tuttle v. Railway Co., 122 U. S. 189; 7 Sup. Ct. 1166;

Southern Pac. Co. v. Seley, 152 U. S. 145; 14 Sup. Ct. 530;

Naylor v. Railway Co., 53 Wis. 661; 11 N. W. 24;
Stephenson v. Duncan, 73 Wis. 404; 41 N. W. 337;
Sweet v. Coal Co., 78 Wis. 127; 47 N. W. 182;
Casey v. Railway Co., 90 Wis. 113; 62 N. W. 624;
Sullivan v. Manufacturing Co., 113 Mass. 396;
Gilbert v. Guild, 144 Mass. 601; 12 N. E. 368;
Crowley v. Pacific Mills, 148 Mass. 228; 19 N. E. 344;
Coullard v. Tecumseh Mills, 151 Mass. 85; 23 N. E. 731;
Railroad Co. v. Lyons, 119 Pa. St. 324; 13 Atl. 205;
Anderson v. Lumber Co., 47 Minn. 128; 49 N. W. 664;
Michael v. Stanley, 75 Md. 464; 23 Atl. 1094;
Rietman v. Stolte, 120 Ind. 314; 22 N. E. 304.

The employer was not bound to consult with its employee as to whether its lightning arrester should be built close to the ground or not. It was *actually* built close to the ground. This the employee and all the world could see, and this the employee did see. So seeing he, an experienced employee, elected to work "near and around" it. That being so it is difficult to see how, so far as an employee is concerned, there was any negligence in the construction of the lightning arrester. It might be a different case if a third party, or an animal, were injured.

But, as shown in our opening brief, if there was any negligence in the construction of the lightning arrester, such negligence was completely "insulated" from the injury. It was only a remote cause or condition, and there was no proximate connection between such negligence and the injury. The essence of the cause of action of defendant in error, if any he has, consists in being sent to work in a dangerous place without warning or instruction. And, as shown in our opening brief, no warning or instruction was necessary because (1) the complaint fails to set forth absence of warning or instruction, and (2) an employer is not bound to warn or instruct an experienced employee.

So far as the lightning arrester itself is concerned it is of a recognized standard type. It is a German invention, and of late years has been much used in the western part of this country, particularly California and Nevada (Rec. p. 302, fol. 98; p. 311, fol. 121; p. 402, fols. 346-352; p. 494, fols. 593-598; p. 504, fols. 618-619; p. 511, fols. 638).

The above references to the record will demonstrate how extensively horn-gap lightning arresters have been in use in the United States, and particularly in California and Nevada. Of course the construction and position are varied to some extent, depending upon local conditions, but the principle of the "horn-gap" is preserved in all of them. Whether constructed near or above the ground the horns and the gap are always a necessary and essential part of the contrivance.

The pipe of which the horns were constructed was so small as to have the appearance of wire. In fact, they were referred to throughout the trial as "wires." Lee Campbell, a witness for defendant in error, testified that "they were gas-pipe—*quarter inch* gas-pipe" (Rec. p. 250, fol. 393). Even he referred to them as "wires," saying, "I helped tie these *wires* on a fixture there on the bottom and up also on top" (Rec. p. 251, fol. 394).

They could not have differed much in appearance from the overhead high tension wires because they were practically the same size. Sheaff testified that the high tension wires were "approximately between three-sixteenths and a quarter of an inch in diameter" (Rec. p. 103, fol. 13). On this subject Sheaff says:

> "Those power wires were approximately between three-sixteenths and a quarter of an inch in diameter; the telephone wires were about one-eighth of an inch in size, possibly a little less. The electric wires, I think, were made of copper and the telephone wire was made of galvanized iron."

Therefore there was very little difference, if any, between the appearance of the high tension wires and the gas-pipe used for the horns of the lightning arrester. The pipes composing the live arms of the lightning arrester were attached to the high tension wires above and in plain view.

No point can be made upon the fact that the horns were made of pipe instead of wire. In fact, they had the appearance of wire, and as they were

capped at the ends they could not be distinguished from heavy wire. The opening in the center was the only thing which could distinguish them from heavy wire, and that opening was closed by the cap. Therefore any observer, unless he had actual knowledge to the contrary, must have regarded them as heavy wires attached to the heavy high tension wires above.

Whether pipe or wire was ordinarily used in lightning arresters of that type does not appear directly, but as the testimony is all to the effect that such lightning arresters, particularly as to the horns, were substantially alike, it is safe to conclude that such pipe was in common use. It does appear, however, that the same kind of pipe was used in the lightning arrester at Wonder and that Sheaff assisted in constructing that arrester and in placing the pipes on the insulators (Rec. p. 445, fol. 464).

On this subject Halpenny testified:

> "Mr. Sheaff and I built that lightning arrester with the exception of some assistance at the time the pole was raised. Outside of that there was nobody else besides myself and Mr. Sheaff that I remember working on the Wonder lightning arrester. *We used the same size pipes at the Wonder lightning arrester for the horns. Mr. Sheaff and myself bent them and put them in and wired them up.* It took the two of us something more than a day to build that lightning arrester. With that lightning arrester for a ground we dug a hole in the ditch, carrying slimes from the mill, in wash ground, and placed a copper plate similar to the one used at the Fairview station, to which was soldered the

> ground wire, which, in turn, ran from the plate to the arrester. Mr. Sheaff assisted me in laying that wire and placing that wire in the moist ground. We were alone at the work."

The lightning arrester at Wonder was built a week or ten days later than the lightning arrester at Fairview (Rec. p. 445, fol. 464).

Sheaff also assisted in laying the ground wire at the Fairview lightning arrester, this ground wire being carried from the dead arms of the lightning arrester to an abandoned shaft some distance away.

Of course electricity could only get to the ground through the ground wires which Sheaff assisted in laying by passing through the pipes forming the live ends of the lightning arrester. Sheaff, therefore, must be held to know that such pipes were to be used in carrying electricity from the high tension wires to the ground.

Under all the circumstances existing at the time, and keeping in mind the fact that the lightning arrester was built on the top of a hill in the Nevada desert, it is difficult to see how its construction constituted "criminal negligence", or negligence at all.

Although we consider that in the particulars mentioned in our opening brief the court erred in its instructions to the jury, we nevertheless feel that if the jury had followed the court's instructions, even as given, the verdict must have been for the plaintiff in error. As frequently happens in cases of serious injury (where the jury's sympathies are

always aroused), they returned their verdict in plain disregard of the law as given by the court.

From any point of view this case may be regarded the verdict was without support in law and should not be allowed to stand.

Dated, San Francisco,
October 27, 1915.

Respectfully submitted,

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